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No. 85583-8

Court of Appeals No. 63787-8-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF MERCER ISLAND,

Petitioner,

vs.

SUSAN CAMICIA,

Respondent

BRIEF OF AMICUS CURIAE ON BEHALF OF THE CITY OF SEATTLE, IN SUPPORT OF PETITIONER

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I. INTRODUCTION

The City of Seattle ("Seattle") joins in and supports the arguments raised in the City of Mercer Island's Petition for Review. Division I's decision limits the scope of the immunity that the Recreational Land Use Statute, RCW 4.24.210, provides, and conflicts with established precedent that applies RCW 4.24.210 to bicycle trails notwithstanding the recognized vital transportation function that trails serve. Division I's decision threatens the protections afforded by statute to landowners across the state, public and private, who provide immeasurable public benefit by gratuitously leaving open their land for recreational purposes. Seattle urges this Court to accept review pursuant to RAP 13.4(b)(2).

II. STATEMENT OF THE CASE

Seattle incorporates by reference the Statement of the Case contained in Mercer Island's Petition for Review.

III. ARGUMENT

Reversing summary judgment for Mercer Island, Division I held that "while the City owns the part of the [I-90] trail where the accident occurred, there are material issues of fact as to whether the City has the authority to designate the I-90 trail as recreational land and assert immunity under RCW 4.24.210." *Slip Op.* at 12. In conditioning statutory immunity under RCW 4.24.210 on a disputed question of fact as to whether Mercer Island had the authority to "designate" its portion of the bike trail as "recreational," Division I reads into the statute terms and

requirements that are not there and thereby limits the statutory immunity in a manner that abrogates the Legislature's articulated intent. Division I's decision is in conflict with prior decisions that make clear that where land is made available for recreational use, it is immaterial how the land might be otherwise, even primarily, "designated."

A. Division I commits errors of statutory construction in reading into RCW 4.24.210 requirements that a landowner have "authority" to "designate" land held open for public use as "recreational" in order to fall within the immunity provided by statute.

RCW 4.24.210, the Recreational Land Use Statute, provides in relevant part:

> (1) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners or others ***in lawful possession and control of any lands*** whether designated resources, rural, or urban, ... ***who allow members of the public to use them for the purposes of outdoor recreation***, which term includes, but is not limited to, ... bicycling, ... without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

[Emphasis supplied.] RCW 4.24.200 articulates the legislative intent behind recreational land use immunity and provides in full:

> The purpose of RCW 4.24.200 and 4.24.210 is to encourage owners or others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.

Where a statute is unambiguous, courts are required to apply the statute as written and "assume that the legislature means exactly what it says." *State v. Radan*, 143 Wn.2d 323, 330, 21 P.3d 255 (2001). An unambiguous statute is not subject to judicial construction and courts may not insert words where the language, as a whole, is clear. *Tenino Aerie v. Grand Aerie,* 148 Wn.2d 224, 239, 59 P.3d 655 (2001).

There is no ambiguity in RCW 4.24.210. The immunity afforded to landowners or those "in lawful possession and control" of land applies broadly to "any land" that is held open for recreational use, regardless of how it might be "designated." There is no language in RCW 4.24.200 or .210 that requires that land held open for recreational use be somehow "designated" as "recreational" in order to come within the purview of the statute. It is accordingly immaterial whether Mercer Island had "authority" to "designate" the I-90 trail as "recreational," and likewise immaterial whether WSDOT had ever "designated" the trail otherwise before transferring this segment of the trail to Mercer Island.

Division I's new construction of RCW 4.24.210 also overlooks the fact that recreational immunity protects *private* landholders, in addition to government agencies. RCW 4.24.210(a) ("any public or private landowners"). It is unclear how a private landowner, perhaps wishing to open up a small residential property, would go about "designating" it as "recreational." That landowner could not issue council minutes or resolutions. Indeed, neither the case law, nor the Legislature, speak to

what a "designation" process should even look like. Division I's interpretation, as a practical matter, seems to preclude a private party from ever claiming immunity.[1]

Under a plain reading of RCW 4.24.210, the only material questions of fact are (1) whether Mercer Island was in "lawful possession or control" of the I-90 trail at the time and location of this accident; (2) whether Mercer Island allowed members of the public to use the trail for the purpose of outdoor recreation, including bicycling; and (3) whether Mercer Island did so without charging users a fee. These questions being answered, undisputedly, in the affirmative, the trial court was correct in dismissing the claims under RCW 4.24.210.

B. Washington case law is clear that immunity under RCW 4.24.210 is not predicated on whether land gratuitously made available for recreational use is intended for uses other than recreation.

Division I places undue emphasis on evidence that WSDOT, the predecessor in interest, "always characterized the I-90 trail as part of the regional transportation system and not as recreational land." *Slip Op.* at 12. How WSDOT ever designated the land, or funded its development, is immaterial. Implicit in Division I's holding is a novel determination that land does not fall within the scope of RCW 4.24.210 unless it is

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[1] Division I's reliance on the "source of funds" is misplaced for similar reasons. Weyerhauser, for example, opens and maintains miles of recreational land – using commercial funds. The statute leaves no room for differentiation.

specifically "designated" as "recreational" or if its primary intended purpose is anything other than "recreational." Setting aside errors of statutory construction as addressed above, Division I's analysis conflicts with the practical reality of trail use and with established law recognizing that land can, and does, serve dual concomitant purposes.

Division I draws a puzzling distinction between "transportation" and "recreation" for purposes of applying the statute. That "recreation" and "transportation" are in no way mutually exclusive should be a point obvious to anyone who chooses to walk or bicycle from Point A to Point B and thereby derives a recreational benefit coincident to their travel. Indeed, RCW 35.75.060 embraces this duality between bicycle "transportation" and "recreation" by authorizing municipalities to direct transportation dollars towards bicycle paths (as did WSDOT) so long as such paths "shall be suitable for bicycle transportation purposes and not solely for recreation purposes." Likewise, Washington case law makes clear that off-road bicycle facilities fall squarely within the immunity provided by statute notwithstanding their recognized and integral place in a transportation infrastructure.

Riksem v. City of Seattle, 47 Wn. App. 506, 736 P.2d 275 (1987), is directly on point. In *Riksem*, the plaintiff bicyclist was injured while

riding on the Burke-Gilman Trail[2] in Seattle. The plaintiff argued that because the trail is heavily used by commuters and not just recreational users, the transportation function of the trail eviscerated the statutory protections provided by RCW 4.24.210. The court soundly rejected the plaintiff's argument:

> The statute applies equally to everyone who enters a recreational area. If an individual is commuting from one point to another, by either walking, running, or bicycling, said individual is at least secondarily gaining the benefits of recreation even though his primary goal may be the actual act of commuting.

Id. at 512. In *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 774 P.2d 1255, *rev. denied*, 113 Wn.2d 1020 (1989), the court again made clear that the statute applies to <u>any</u> land that is made available without fee for recreational use regardless of whatever other function the land is intended to serve. Holding that a roadway across a dam fell within the scope of RCW 4.24.210 even though the primary purpose of the land (to facilitate hydroelectric power generation) was not recreational, the court dismissed any significance as to how land held open for recreational purposes might

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[2] Formerly a railroad right-of-way, the Burke-Gilman Trail is a pedestrian and bicycle trail that extends from Seattle to Redmond, where it connects with the Samammish River Trail. The Burke-Gilman is both a major recreational trail and a vital part of Seattle's bicycle infrastructure, serving thousands of recreational and commuting cyclists daily. *See* http://www.seattle.gov/transportation/burkegilmantrailhistory.htm.

otherwise be designated or put to primary use for purposes of applying the statute:

> We find that if a person in lawful possession and control of lands allows the public to use them for recreational purposes without charging a fee, the recreation use statute applies.

Id. at 608. As in *Riksem*, the *Gaeta* court affirmed that a user's non-recreational use of land held open for recreational purposes does not remove the analysis from the framework of RCW 4.24.210:

> ***If [a landowner] has brought himself within the terms of the statute,*** then it is not significant that a person coming onto the property may have some commercial purpose in mind. By opening up the lands for recreational use without a fee, City Light has brought itself under the protection of the immunity statute[.]

Id. at 608-09 [emphasis supplied].

Federal case law interpreting RCW 4.24.210 further illuminates Division I's errors in attaching significance to how WSDOT originally "designated" the I-90 Trail or with regard to whether Mercer Island had the authority to re-"designate" the trail for purposes other than transportation. In *Power v. Union Pacific Railroad Co.*, 655 F.2d 1380 (1981), the Ninth Circuit, applying Washington law, held that RCW 4.24.210 applied to active railroad tracks that could be traversed by the public to access a beach for recreational purposes, even though the purpose of the tracks was to facilitate railroad operations. Reversing the

District Court's ruling that the RCW 4.24.210 did not apply, the appellate court explained:

> [T]he [district] court found that the "character of the use of the tracks and right-of-way in question was not such as would be for the 'purposes of out-door recreation.'" The undisputed facts show that [the plaintiff's decedent] and her friends used the right-of-way as access to beaches otherwise inaccessible except by boat. ... Moreover, in Washington, "(a) statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat the manifest object, it should receive the former construction." *Roza Irrigation District v. State*, 80 Wn.2d 633, 497 P.2d 166, 169 (19720. Here, the declared purpose of the act is to encourage those in possession of land to make it available to the public for recreational purposes. ***By not fencing the right-of-way, Union Pacific indirectly made the entire coastline available for such recreation. Whether a wise policy or not, it appears this is precisely what the Washington legislature wished to encourage by providing limited liability.***

Power, 655 F.2d at 1387 [emphasis supplied].

Here, the character of the I-90 Trail is plainly such as would be used for outdoor recreation (bicycling). *Riksem*, *supra* at 512. Setting aside the recognized symbiosis between bicycle "transportation" and "recreation" that *Riksem* observed, any fact that WSDOT may have "designated" and funded the trail for transportation purposes, as authorized by RCW 35.75.060, is irrelevant under *Riksem*, *Gaeta*, *Power*, and the plain language of RCW 4.24.210 itself. Even accepting the far-fetched possibility that neither WSDOT nor Mercer Island ever contemplated that bicyclists might use the trail for recreational purposes,

there is no evidence in the record that Mercer Island ever excluded recreational users from the trail or charged a fee for uses other than transportation.

Similarly, Mercer Island's ability to "close down" the portion of the trail where the accident occurred is not in dispute. As City Engineer Yamashita explained,

> ... I believe that the City could unilaterally "shutdown" or limit use of this portion of the I-90 trail if it desired to do so. If it did, it would not need to seek permission from any other authority since it is owned and controlled by the City.
>
> ... The City did close down the trail at various times during the construction of the park and ride. No permission was sought from the State or Federal Government in doing so.

CP 609. The deposition transcripts cited by Camicia obviously pertain to "shutting down the entire I-90 trail," *see* CP 685, which is altogether different. Division I's reasoning, in this regard, is a concern to all cities owning only a portion of large regional recreation areas.[3]

By allowing members of the public to use the I-90 Trail for purposes of outdoor recreation, even if indirectly or secondary to the purpose of transportation, Mercer Island – being lawfully in possession and control of its portions of the I-90 Trail – has plainly "brought [it]self

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[3] By way of further example, the City of Seattle maintains large parts of the Burke-Gilman Trail, but could not open and close other portions of it that run through Redmond and Bothell.

within the terms of the statute." *Accord Gaeta*, *supra*, at 608-09. Division I's decision holding that whether RCW 4.24.210 applies depends on a question of fact as to whether Mercer Island had the authority to re-"designate" the trail for recreational use is in conflict with *Riksem*, *Gaeta*, and *Power* and thus warrants review under RAP 13.4(b)(2).

IV. CONCLUSION

By reading into RCW 4.24.210 terms and conditions that are not there, Division I abrogates the statutory immunity that the Legislature has granted to all landowners, public and private, who open their land, free of charge, to the public for recreational use. This decision has a particularly significant effect on municipalities by stripping away protections that had heretofore made viable the proliferation and integration of recreational trails into the transportation infrastructure notwithstanding dire budgetary constraints and overwhelming, competing, and more emergent demands. Division I's decision as to municipal bicycle trails is not only in conflict with established case law directly on point but, in subjecting municipalities to new liability for accidents on bicycle trails, undermines the Legislature's clearly articulated intent behind the statute.

Mercer Island's Petition for Review should be granted.

DATED this 10th day of March, 2011.

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CERTIFICATE OF SERVICE/FILING

Donna M. Robinson certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am a Legal Assistant with the Seattle City Attorney's office.

On March 11, 2011, I requested ABC-Legal Messengers, Inc., to deliver, by March 14, 2011, a copy of the foregoing Brief of Amicus Curiae on Behalf of the City of Seattle in Support of Petitioner upon the following counsel:

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and to file the original and one copy of said document with the Washington State Supreme Court.

DATED this 11th day of March, 2011.

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